

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEEVESTER LEE HATHORN, a/k/a  
HATHORN LEE LEEVESTER,

Defendant-Appellant.

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UNPUBLISHED

January 20, 2011

No. 294571

Wayne Circuit Court

LC No. 09-010716-FC

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, and breaking and entering, MCL 750.110. The trial court sentenced defendant as a fourth habitual offender to 900 months to 100 years' imprisonment for the armed robbery conviction, to life imprisonment for the assault with intent to commit murder conviction, and to 20 to 50 years' imprisonment for the breaking and entering conviction. We affirm.

**I. BASIC FACTS**

On May 24, 2008, the victim was working at her place of employment in Plymouth, Michigan. She was all alone that day and the doors had locked automatically when she entered the building. A few hours later, she was startled when defendant appeared in her office and asked her for money. The victim responded that she did not have any. Defendant then hit the victim to the ground and hit her repeatedly in the head with a hard object. Defendant dragged the victim to another room, tied her up, and told her he was going to kill her. He then left and the victim managed to untie herself and call 911 for help.<sup>1</sup> Evidence collected from the scene identified the DNA of an unknown male and the victim's DNA mixed together. The unknown male's DNA was entered into a database containing prior offenders' DNA to determine whether

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<sup>1</sup> The victim had to have several surgeries to relieve pressure from her brain.

it matched the DNA of any prior offender. The DNA entered into the system matched defendant's DNA.

Defendant was arrested and brought before a jury. The DNA evidence was admitted at trial. The victim also identified defendant as her attacker. She testified that she saw his face as he was hitting her and also while he was tying her up. The victim indicated that she told police that defendant was a black male in his 30s, had no facial hair or wrinkles, and was about 5 feet 10 inches tall and 180 pounds. She testified that defendant looked no different at trial than at the time of the attack, except that he now had facial hair. A sketch was introduced into evidence depicting the assailant the victim had described to a sketch artist. The defense theory was that defendant's identity was mistaken. The jury convicted defendant as charged.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant argues that counsel's performance was deficient for failing to obtain a DNA expert and an eyewitness identification expert. Claims of ineffective assistance of counsel present mixed questions of fact and law, which we review for clear error and de novo, respectively. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because defendant did not move for a *Ginther*<sup>2</sup> hearing, our review is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel a defendant must show that counsel's performance fell below an objective standard of reasonableness under professional norms, and that there is a reasonable probability that, but for counsel's errors, the result would have been different. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009). A defendant must overcome a strong presumption that counsel's decisions constituted sound trial strategy and this Court will not second-guess counsel's decisions with the benefit of hindsight. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Further, although the decision to call witnesses is a matter of trial strategy, the failure to do so may constitute ineffective assistance if the failure deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

### A. DNA EXPERT

Defendant first points out that the trial court granted defense counsel's motion for appointment of a DNA expert, but nothing in the record shows that counsel ever obtained the expert. Consequently, in defendant's view, defense counsel's failure to obtain the DNA expert, for consultation purposes or to provide testimony at trial, rendered counsel's assistance ineffective. We disagree.

It is untrue, as defendant asserts, that nothing in the record demonstrates whether defense counsel ever consulted a DNA expert. At a June 8, 2009 hearing, at which defense counsel was appointed to represent defendant, counsel indicated that he "already [had] a person in mind to

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

review the DNA who's one of the top experts in the world." At a pretrial conference hearing on June 12, 2009, counsel again indicated that he intended to consult a DNA expert, and the trial court entered an order granting defendant's motion for the appointment of a DNA expert that same day. At trial, part of counsel's trial strategy was to discredit the DNA evidence as a "recent [scientific] development" secondary to the more conclusive evidence of the absence of fingerprints. The reasonable implication to be drawn from these events is that counsel did consult a DNA expert in preparing his case, that he moved to get paid for it, and that he ultimately found the expert's testimony unfavorable. Contrary to defendant's argument, the lack of conclusive evidence on the record showing that counsel did in fact consult the expert is not grounds for establishing ineffective assistance of counsel. We also note that defendant never moved for a *Ginther* hearing to establish that counsel failed to consult the DNA expert, he never moved for a remand in this Court for a *Ginther* hearing, and he has not provided an affidavit, or other documentary evidence, from defense counsel establishing that counsel did not consult a DNA expert. Thus, the argument that counsel rendered ineffective assistance for failure to consult an expert lacks factual support in the record. Accordingly, counsel's performance in this regard was not deficient.

We also reject defendant's related contention that counsel's assistance was ineffective for failing to call a DNA expert as a witness. Defendant concedes that a strategic decision existed justifying counsel's decision not to call the witness and we agree. As defendant notes, counsel may not have called the witness because his or her testimony would "merely confirm the [testimony] of the prosecutor's expert." In our view, defendant has not overcome the presumption that this strategy was a sound one. Defendant provides no evidence or argument indicating that the DNA expert would have testified that the DNA analysis was flawed or otherwise mistakenly identified defendant. In other words, defendant has failed to show or explain how counsel's failure to call this DNA expert deprived him of a substantial defense. See *Dixon*, 263 Mich App at 398. Counsel's decisions with regard to the DNA expert did not fall below the objective standard of reasonableness under professional norms.

#### B. EYEWITNESS IDENTIFICATION EXPERT

Defendant also contends that counsel's performance was deficient because he did not request the appointment of an eyewitness identification expert. We disagree. As defendant suggests, an eyewitness identification expert could have explained to the jury how an eyewitness's memory is affected by time, by traumatic events, and by seeing the alleged defendant in prison clothing. However, under the circumstances, counsel may have decided not to request an eyewitness identification expert because the witness may have bolstered the reliability of the victim's identification. Instead, counsel may have believed that the better tactic would be to expose the shortcomings of the victim's identification through cross-examination and closing argument. We believe this to be the case, given that defense counsel attacked the victim's credibility by pointing out the time between the incident and trial, the fact that the victim lost her glasses during the altercation, and the suggestive nature of the identification procedure. Further, we note that even if an eyewitness identification expert had been called, he or she would not have provided evidence amounting to a substantial defense. The testimony would only have affected the victim's credibility and the weight the jury would assign to her eyewitness identification. Accordingly, defendant has failed to demonstrate that counsel's decision not to call an eyewitness identification expert fell below objectively reasonable

professional norms. And, even if counsel's decision was deficient, it would not have affected the outcome of the proceedings, given the DNA evidence placing defendant at the scene. Defendant was not deprived of the effective assistance of counsel. No relief is warranted on appeal.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Elizabeth L. Gleicher  
/s/ Cynthia Diane Stephens